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No. 05-1671

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES AND LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

REPLY BRIEF

J. ROBERT PERSONS
CARTER & ANSLEY LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners

203234

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Respondent Board of Regents filed a Response to the Petition on August 25, 2006 and the remaining respondents (collectively the "Al-Jabi" respondents) filed a consolidated Response the same date. Both briefs first address the question of whether the jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a) and then address the merits of the Petition. Petitioners file this Reply to both briefs, addressing the question of jurisdiction and briefly replying to the challenge to the merits of the Petition.

The claims of petitioner Derek Canas span a period of time commencing in the first quarter of 1985 when he received an HIV contaminated blood transfusion at The Medical College of Georgia ("MCG") and in ending in April 2001, when he was diagnosed with AIDS. This litigation commenced on December 28, 2001, against two treating physicians who had seen and treated Derek for a period of seven to ten years and was amended on February 7, 2003, to add the owners and operators of MCG, whose staff physicians had seen or treated the child for a period of almost 16 years. Derek Canas attained the age of majority on November 1, 2002.

I. The Proceedings Below Have Produced a Final and Reviewable Order under 28 U.S.C. § 1257(a) and this Court May Properly Exercise Jurisdiction.

A. The Supreme Court of Georgia Order Meets Finality Criteria Notwithstanding Further Proceedings in Georgia.

When the Supreme Court of Georgia refused to hear Petitioners' direct appeal of the trial court's orders in its order dated February 27, 2006 (Appendix A), it expressly found

that the constitutional challenges raised by the Petitioners had been adversely adjudicated and cited specific cases. In their motion for reconsideration, Petitioners not only challenged the holdings in those cases, but advanced in substance the arguments made in their Petition here, citing relevant cases from other jurisdictions which reached contrary conclusions with respect to conceptually indistinguishable statutes.

Respondents opposed petitioners' motion for reconsideration in the Supreme Court of Georgia on the constitutional merits. No respondent suggested that the constitutional issues had not been timely or properly raised in the trial court. The trial court's order in Appendix D states on its face that the constitutional questions were properly raised and an order in the Georgia Court of Appeals dated November 2, 2005 (Appendix E) further makes the point that there was a timely direct appeal of the trial court orders to the Supreme Court of Georgia which has exclusive jurisdiction to hear those issues.

After the case was transferred to the Georgia Court of Appeals, Board of Regents stated in their brief to that court:

> By transferring this appeal, asserting that these statutes are unconstitutional, to this Court, the Supreme of Georgia has determined the law of the case under [O.C.G.A] § 9-11-60(h) that §9-3-73 does not violate the constitutional guarantees of equal protection or due process. *Egerton v. Jolly*, 133 Ga. App. 805, 806 (1975)[212 S.E. 2d 462].

(Board of Regents Georgia Court of Appeals Brief at p.5). The cited statute O.C.G.A. § 9-11-60(h) provides that "any ruling by the Supreme Court . . . in a case shall be binding in

all subsequent proceedings in that case in the lower court and in the Supreme Court .. ." Respondent Al-Jabi in his brief filed in that same court similarly stated as follows:

> The transfer of the appeal by the Supreme Court to the Court of Appeals is a final determination that no constitutional question was properly raised or meritorious. *Egerton v. Jolly*, 133 Ga. App. 805. 806 (1975).

(Al-Jabi Court of Appeals Brief at p. 11-12). The other respondents took "me too" positions. Claims of the Al-Jabi respondents that Petitioners have further recourse to another appeal to the Supreme Court of Georgia on the constitutional questions are rebutted by their own arguments in the Georgia Court of Appeals and by the statute quoted above by the Board of Regents. Having argued to the Georgia Court of Appeals that the Order of the Supreme Court of Georgia was in fact a "final determination" of the constitutional issues, Respondents' argument here that the Supreme Court of Georgia Order of February 27, 2006 is *not* a final order as would allow this court to accept jurisdiction under 28 U.S.C. § 1257(a)[1] is disingenuous. Respondents simply seek to interpose an unwarranted procedural obstacle to a ruling on the constitutional merits.

The statutes challenged here dictate the rules of engagement which will govern a lengthy trial involving more than a dozen medical professionals and administrators with statutory constraints on both the period of negligent acts (5 years) and the period of injuries (2 years) at issue. However, if the challenged statutes are unconstitutional, then the tolling provision under O.C.G.A. § 9-3-90 would apply

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1. Petitioners acknowledge that to avoid any later waiver argument they continue to to preserve the constitutional questions raised here in every appellate brief.

in this case as it does to other tort claims brought by minors, such that all of the claims of petitioner Derek Canas would be tolled and no statute of limitations or repose would begin to run until he attained the age of majority on November 1, 2002. This was the stated effect of actions taken by the New Hampshire Supreme Court in *Carson v. Maurer*, 424 A.2d (N.H. 1980) and the Ohio Supreme Court in *Mominee v. Scherbarth*, 503 N.E.2d 717 (Ohio 1986) in striking down comparable statutes. There would then be no wasteful trial of improperly truncated claims.

Because the Supreme Court of Georgia has held that neither non-discovery, fraud nor anything else tolls the statute of repose, *Simmons v. Sonyika*, 614 S.E.2d. 27, 30 (Ga. 2005), and considers the constitutional question decided, there is no trial court *scenario* which would allow Derek Canas to put at issue the negligent acts of the respondents dating back more than five years, absent a prior determination that the statute of repose as written or applied denies him equal protection and due process of law. If the time constraints of the statutes are unconstitutional, and the Order of the Supreme Court of Georgia has foreclosed further consideration of that issue, as respondents have argued to the Georgia Court of Appeals, then a complex trial involving weeks of professional testimony would be a potential nullity. That is so because it would take place under unconstitutional rules of engagement unless this Court affirms the holding of the Supreme Court of Georgia on the constitutional issues raised. Absent that ruling or a denial of certiorari here, Petitioners face a lengthy trial, and may prevail, but only on improperly truncated claims, or Petitioners may lose. Either outcome portends a further attempt to gain appellate review of the same constitutional issues presented here. If Petitioners' efforts were successful, then yet another trial with all of the attendant delays and expense would inevitably follow. This case even now will have been pending at least

five years before any trial takes place. Only a trial with a *prior* determination of the constitutional issues will avoid further protracted proceedings. Forcing a litigant to go to trial with an unresolved constitutional question affecting the outcome on the merits would itself strain precepts of due process.

B. Respondents Misconstrue *Cox Broadcasting.*

All parties point to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) as providing the platform for review of a judgment or decree of the higher state court where further proceedings may be pending. In that case this Court noted "its past pragmatic approach in determining finality. . . ." *Id.* at 470. The court then delineated "at least four categories" of cases where review might be undertaken notwithstanding the possibility of ongoing state court litigation, after first identifying the threshold consideration:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid the 'mischief of economic waste and of delayed justice.'

Id. at 477-78. The Court's threshold test is met here and the listed categories are not exhaustive as evidenced by the use of the words "at least." The only federal question here concerns the constitutionality of the Georgia medical malpractice statutes of limitations/repose. Left unanswered, the mischief which ensues is a trial limited to evidence of medically negligent acts spanning five years and injuries spanning two. That trial would be an enormous waste if in fact the statutes are unconstitutional. If the statutes are

unconstitutional, Derek Canas' claims were tolled until he reached age of majority [O.C.G.A. § 9-3-90] and all negligent acts and all injuries throughout his childhood caused by Respondents would be at issue.

A significant consideration identified in *Cox Broadcasting* is whether "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice . . ." *Id.* at 477. In the first category, the Court cited *Mills v. Alabama*, 384 U.S. 214 (1966), where jurisdiction was retained "to avoid an inexcusable delay . . . a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.* at 479. This case falls within the first category since the resolution of the federal issue will conclusively determine whether any of Petitioners claims are barred by the challenged statutes, because if not, all claims were timely asserted within two years of Derek Canas attaining the age of majority. The constitutional questions must be answered on the merits prior to trial to assure a trial on the merits.

The Court's decision in *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963) cited in *Cox Broadcasting* also provides an analogous set of circumstances. There, the Court exercised jurisdiction to review a Texas Supreme Court ruling on competing state and federal venue statutes, which differed as to where two national banks could be sued. The Court reviewed the matter because it was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 484. The consequence of not reviewing the case would have been to subject the litigants to "long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Id.*

As Respondents have suggested to the Georgia Court of Appeals, because the Supreme Court of Georgia has previously decided that the statutes challenged here are constitutional, both in multiple prior cases and again in this one, the constitutional issues are not again reviewable by Georgia courts prior to trial; yet, it is imperative that there be a decision on the constitutional merits of these statutes prior to trial to assure its validity. Pretending that the Supreme Court of Georgia will review the constitutional question further, after it has persistently refused to do so, elevates futile procedural formalities to new heights.

II. There Are Clear Conflicts in Equal Protection and Due Process Analysis of Conceptually Indistinguishable Statutes.

The Al-Jabi respondents call the Court's attention to *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242 (7th Cir. 1989). In that case, the Seventh Circuit upheld Indiana's two year medical malpractice statute of limitations and would not apply heightened scrutiny to a minor's claim. That approach differs from the approach taken by the Second Circuit in *Ramos v. Town of Vernon*, 353 F.3d 171 (2nd Cir. 2003), which applied heightened scrutiny to an ordinance curtailing the rights of children, albeit not in a medical malpractice case. Notably, the Indiana Supreme Court in *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), a decade after the *Douglas* decision, held the successor statute (validated in *Douglas)* unconstitutional under state constitutional law, as applied to a breast cancer victim. The plaintiff, it was held, did not know and could not have discovered in the exercise of reasonable diligence that she had sustained a medical malpractice injury more than two years prior to bringing a lawsuit and the claim would have been barred under the Indiana statute of limitations, had it not been found unconstitutional in its application.

While the *Martin* case was not decided under the Fourteenth Amendment, it serves to illustrate two important points. First,

many comparable statutes upheld by other courts [and relied upon by Respondents] often are accompanied by case law in those states upholding a discovery rule or a continuing treatment rule so that "blameless ignorance" does not bar a bona fide claim. The absence of a discovery rule in *Martin* left Indiana's statute unconstitutional under that state's constitution in its application. Second, *Martin* illustrates why the Georgia statutes are both irrational and arbitrary. Patients routinely do not know when they have been subjected to an act of medical negligence and the onset of a discernible injury from an unknown mis-diagnosis may not occur within the statutory period. *Martin* determined that the Indiana statute of limitations was unconstitutional in its application to an injury discovered outside the limitations period. *Even if the Georgia statutes were facially constitutional, they could not be applied here to Petitioners' claims in a manner consistent with due process.*

Respondents, in pointing out states where such statutes have passed constitutional muster, completely ignore the fact that many apply a discovery or similar rule to assure that latent claims are not barred.[2] Georgia has no comparable provision or common

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2. *See, e.g., Jones v. McDonald*, 631 So.2d 869 (Ala. 1993) (discovery rule applies); *Pastchol v. St. Paul Fire & Marine Ins. Co.*, 929 S.W.2d 713 (Ark. 1996)(continuous treatment doctrine tolled statute of limitation); *Blanchette v. Barrett*, 640 A.2d 74 (Conn. 1994)(statute of repose may be tolled under continuous treatment doctrine or continuous course of conduct doctrine); *Benge v. Davis*, 553 A.2d 1180 (Del. Sup. 1989)(statute of limitation began to run on date of physician's last treatment of patient); *Anderson v. George*, 717 A.2d 876 (D.C. 1998) (continuous treatment doctrine applicable); *Flores Cruz v. Avon Products, Inc.*, 693 F. Supp. 1314 (D.C. P.R. 1988); *Cunningham v. Huffman*, 609 N.E.2d 321 (Ill. 1993)(plaintiff not barred by statute of repose from ongoing course of continuous negligent treatment); *Walters v. Rinker*, 520 N.E.2d 468 (Ind. App. 1988); *Protective Life Ins. Co v. Sullivan*, 682 N.E.2d 624 (Mass. 1997)(applying discovery rule); *Doe v. American Nat. Red Cross*, 923 F. Supp. 753 (D. Md. 1996)(applying discovery rule); *Amrhein v. Petachenko*, 435 N.W.2d 10 (Mich. App.

(Cont'd)

law to protect minors or patients from these statutes which have no savings feature on their face. Yet, Georgia routinely protects the rights of minors in other than medical cases, otherwise starts a tort clock running when a cause of action accrues (embracing a discovery rule), and even employs a continuing tort concept in other contexts. Respondents' reliance on other states which have upheld the constitutionality of such statutes is misplaced, absent a concurrent analysis of whether those states employ a discovery rule or other savings provision to ensure that patient claims are not voided simply because they are undiscovered within a prescribed period of limitations. That analysis, not surprisingly, is missing from their briefs. Suffice it to say that there are numerous contradictory constitutional results construing conceptually indistinguishable statutes, and the cases

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1988); *Chizmadia v. Smiley's Point Clinic*, 428 N.W.2d 459 (Minn. App. 1988); *Montgomery v. South County Radiologists, Inc.*, 49 S.W.3d 191 (Mo. 2001)(continuing care exception to statute of limitation applied); *Stallings v. Gunter*, 394 S.E.2d 212 (N.C. App. 1990)(applying continuing course of treatment doctrine); *Frezell v. Iwersen*, 436 N.W.2d 194 (Neb. 1989) (action accrues when plaintiff discovers the malpractice or the resulting injury); *Troum v. Newark Beth Israel Medical Ctr.* , 768 A.2d 177 (N.J. Super. 2001)(cause of action began to run upon discovery that patient was HIV positive as a result of another's fault); *Borgia v. New York*, 187 N.E.2d 777 (N.Y. 1962)(applying continuing treatment doctrine); *Frysinger v. Leech*, 512 N.E.2d 337 (Ohio App. 1991)(commencement of statute of limitations is delayed until patient terminated relationship with physician); *Hotelling v. Walther*, 130 P.2d 944 (Ore. 1942); *Haggart v. Cho*, 703 A.2d 522 (Pa. Super. Ct. 1997)(discovery rule applies to determine date when patient could reasonably be expected to know of his injury); *Liffengren v. Bendt*, 2000 S.D. 91, 612 N.W.2d 629 (2000)(recognizing the continuous treatment rule); *Stanbury v. Bacardi*, 953 S.W.2d 671 (Tenn.1997)(adopting discovery rule); *Wilson v. Korthauer*, 21 S.W.3d 573 (Tex. App. 2000); *Farley v. Goode*, 252 S.E.2d 594 (Va. 1979); *Tamminen v. Aetna Cas. & Sur. Co.*, 327 N.W.2d 55 (Wis. 1982); *Metzger v. Kalke*, 709 P.2d 414 (Wyo. 1985)(adopting the continuous treatment rule in medical malpractice cases).

cited by Petitioners employed equal protection or due process analysis tracking federal analysis to overturn comparable statutes.

There are two overriding and recurring themes premised on irrefutable logic in cases overturning comparable statutes: (1) Children who lack the capacity and ability to protect their legal rights in other contexts, as state laws routinely provide, cannot be rationally empowered by any legislature with that capacity only in claims against doctors; and (2) statutes of limitations/repose may not rationally start to run on latent or undiscovered negligent acts or injuries. Finally, Respondents claimed rational basis for these special medical statutes, namely that medical claims are somehow more prone to "staleness" than other injury claims of minors, has a hollow ring when medical care and treatment is routinely and carefully dated, documented and recorded. The goal of avoiding stale medical claims in Georgia cannot be rationally achieved by starting a statutory clock in cases where parents, patients and children cannot and do not know it is running.

CONCLUSION

Petitioners respectfully pray that the Supreme Court of the United States exercise jurisdiction and grant the Writ of Certiorari.

Respectfully submitted,

J. Robert Persons
Carter & Ansley LLP
Atlantic Center Plaza, Suite 2300
1180 West Peachtree Street
Atlanta, Georgia 30309
(404) 658-9220

Attorneys for Petitioners